Office-Supreme Court, U.S.
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SEP 11 1961
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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1961.

No. 305.

MISSISSIPPI VALLEY BARGE LINE COMPANY,
Petitioner,
versus
INLAND WATERWAYS SHIPPERS ASSOCIATION and
L. B. FOSTER COMPANY,
Respondents.

BRIEF

In Opposition to Petition for Writ of Certiorari.

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JURISDICTION.

Rule 19 of the Revised Rules of this Court states that review on certiorari will be granted only where there are special and important reasons therefor. Respondents submit that this case does not present such reasons.

Because the Harter Act has been uniformly interpreted since 1893, without conflict of decision in any court, as imposing a non-delegable duty upon common carriers by water to properly load and stow cargo aboard its vessels and prohibiting these common carriers from avoiding liability for damage caused by improper stowage, and because the Interstate Commerce Commission is clearly without authority to repeal the Harter Act, this case presents only well-settled questions of federal law correctly decided below.

QUESTION PRESENTED.

Where merchandise was shipped from Pittsburgh, Pa., to the shipper in Houston, Texas, in a barge under contract of common carriage by water and the cargo was found damaged upon receipt by the shipper in Houston due to improper stowage of the common carrier's barge by an independent stevedore in Pittsburgh (and possibly also at Owensboro, Kentucky) at which points the shipper had no loading facilities, may the common carrier by water, who is admittedly subject to the Harter Act, which prohibits the carrier from avoiding its obligation to carefully handle and stow the vessel's cargo, escape liability thereunder by resorting to the device of filing a tariff with the Interstate Commerce Commission which provides that the stevedore is the agent of the shipper and that the common carrier by water shall not be liable for damage caused by improper stowage and then issuing a shipper's load and count bill of lading containing the same exculpatory language as to loading and stowing as contained in the tariff?

STATUTE INVOLVED.

The statutes involved are sects. 1, 2 and 4 of Harter Act (Act of February 13, 1893, c. 105, 27 Stat. 445, 46 U. S. C. A., §§ 190-191, 193). The Harter Act sets forth the duties, responsibilities, liabilities, rights and immunities of common carriers by water.

Section 1 of the Harter Act.

46 U. S. C. A., § 190. **Stipulations relieving from liability for negligence.**

It shall not be lawful for the manager, agent, master, or owner of any vessel transporting merchandise or property from or between ports of the United States and foreign ports to insert in any bill of lading or shipping document any clause, covenant, or agreement whereby it, he, or they shall be relieved from liability for loss or damage arising from negligence, fault, or failure in proper loading, stowage, custody, care, or proper delivery of any and all lawful merchandise or property committed to its or their charge. Any and all words or clauses of such import inserted in bills of lading or shipping receipts shall be null and void and of no effect. Feb. 13, 1893, c. 105, § 1, 27 Stat. 445.

Section 2 of the Harter Act.

46 U. S. C. A., § 191. **Stipulations relieving from exercise of due diligence in equipping vessels.**

It shall not be lawful for any vessel transporting merchandise or property from or between ports of the United States of America and foreign ports, her owner, master, agent, or manager, to insert in any bill of lading or shipping document any covenant or agreement whereby the obligations of the owner or owners of said vessel to exercise due diligence properly equip, man, provision, and

outfit said vessel, and to make said vessel seaworthy and capable of performing her intended voyage, or whereby the obligations of the master, officers, agents, or servants to carefully handle and stow her cargo and to care for and properly deliver same, shall in any wise be lessened, weakened, or avoided. Feb. 13, 1893, c. 105, § 2, 27 Stat. 445.

Sect. 4 of the Harter Act (46 U. S. C. A., sect. 193) is set forth hereinafter at p. 21 of this brief.

STATEMENT OF THE CASE.

Respondents do not object to petitioner's efforts to state the facts as favorably as possible, but petitioner's "statement of the case", we believe, goes beyond this permissible limit. It not only omits certain significant facts found by the courts below, but it overstates certain facts, contains alleged facts not to be found in the record, and ends by asserting that this is a case of a shipper damaging his own cargo, which it is not. Therefore, we herewith set forth a concise statement of the facts as found by both courts below.

As a member-shipper of respondent Inland Waterways Shippers Association, a non-profit pool-shipping association of shippers in the Houston, Texas, area (R. 45), respondent L. B. Foster Company employed respondent Association at Houston to arrange transportation of certain newly-purchased pipe from the manufacturer's plant in Youngstown, Ohio, to respondent Foster's plant in Houston (Fdg. R. 141). All shipping arrangements, including affreightment of this pipe by petitioner from Pittsburgh, Pa., to Houston as common carriage by water and not as towage or under charter arrangement, were made by respondent association, which was billed and in turn billed respondent Foster (Fdg. R. 139, 141). Neither of the respondents had any docks or loading facilities for

water carriage in Pittsburgh, nor did petitioner. When a shipper had no loading terminal in Pittsburgh, petitioner would notify Marion Coal and Transfer Company, whose loading terminal was opposite petitioner's fleet at the river in Pittsburgh and who would then contact the shipper and arrange to act as stevedore (Fdg. R. 139-140). Consequently, the pipe was loaded into railroad cars at the Youngstown mill and these railroad cars were moved to the dock of this stevedore, where petitioner placed its barge to be loaded (Fdg. R. 141). This stevedore loaded this pipe into petitioner's barge, together with other cargo consigned to the respondent association in Houston (Fdg. R. 141). Petitioner prepared and issued its loading diagram showing the stowage plan of cargo aboard its barge (Pltf's. Ex. 12 at R. 77; Fdg. R. 141-142) and also issued its straight bill of lading containing "Shipper's load, weight and count" terminology through to Houston, although petitioner employed another water carrier to transport this barge beyond New Orleans (Pltf's. Ex. 11 at R. 75; Fdg. R. 141). While en route, petitioner stopped its barge at Owensboro, Kentucky, where additional cargo consigned to respondent association was loaded by Green River Steel according to petitioner's bill of lading, but petitioner's loading diagram does not show where this additional 96,820 pounds of iron or steel billets were stowed. Upon arival of petitioner's barge at Houston, the cargo was unloaded by another stevedore and this pipe was delivered to respondent Foster's plant by railroad, where the damage was discovered. Both courts below found, and petitioner admits, that this damage resulted from improper stowage of the cargo aboard petitioner's barge; specifically, the stevedores placed heavy steel billets upon this hollow pipe at Pittsburgh (and perhaps also at Owensboro) without sufficient dunnage, thereby allowing the billets to dent the pipe walls while en route.

Petitioner asserts (pp. 4-5) that "Marion is an independent terminal operator having no connection with Valley by stock ownership, directors, officers, employers (sic), or otherwise." This bald assertion is completely unsupported by the record or the findings below. As stated above, the record does show petitioner's practice to secure employment of Marion as stevedore and both courts below so found. And the record also shows that under Section 3 of its tariff petitioner offers to employ Marion on behalf of the shipper, to bill the shipper for Marion's charges, and even lists Marion's stevedoring charges (S. R. 2-3). Therefore, we suggest that it can hardly be said that there is no connection between Marion and petitioner.

Among the omissions in petitioner's statement is the fact that petitioner's own witness testified that proper loading of a barge is of the utmost importance (R. 109-113); that improper loading can result in a barge standing on end or buckling (R. 112) and can easily result in the placing of too great a stress upon a portion of a barge (R. 113). Items Nos. 510, 520 and 440 of petitioner's tariff (S. R. 1-2) recognize that improperly loaded cargo could shift while a barge is en route (causing an uneven draft or insufficient freeboard) and impose a standard of proper loading and stowage for the safety and security of petitioner's barges and tows. Stowage is also important so that cargo can be unloaded or additional cargo loaded en route and so that a subsequent voyage may be arranged to commence after delivery of certain cargo; petitioner was quite concerned that no cargo destined for Beaumont be loaded on barge MV-618 by the stevedores (S. R. 3). As stated by the Court of Appeals, 289 F. 2d 374, 381 (p. 13a of petition): "In the record before us there was evidence that Valley was much concerned with the supervision and problems of proper loading and stowage."

Petitioner has also neglected to mention that for transporting this pipe as common carriage, the shipper paid petitioner's highest rate under its tariff, the "A" rate (R. 78). This is the rate petitioner calls its "insured rate" (S. R. 9). It should further be noted that, under all of its rates, petitioner disclaims liability for improper stowage of its barges. Therefore, even if the Interstate Commerce Commission could relieve petitioner of its statutory liability for improper stowage in return for a lower rate—which it clearly cannot do, as we point out in our argument—this is not such a case.

The foregoing are merely a few examples of why we find petitioner's statement wholly insufficient and inaccurate. Recognizing that this Court has often held that:

> ". . . A court of law, such as this Court is, rather than a court for correction of errors in fact finding, cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error."

Graver Mfg. Co. v. Linde Co., 336 U. S. 271, 275 and cases cited therein, respondents are completely satisfied with the statements of facts, not by petitioner, but by both the District Court, 194 F. Supp. 819 (R. 139), and the Court of Appeals, 289 F. 2d 374 (p. 1a et seq. of petition), and are prepared to rely thereon without attempting to paint a more favorable picture for this Court.

REASONS FOR DENYING THE WRIT.

Petitioner does not present an important question of federal law which has not been, but should be, settled by this Court. Instead, petitioner is requesting this Court to radically change the existing, well-settled law and to emasculate federal legislation—a request which might

properly be presented to Congress, but not to this Court.

At the outset two factors must be clearly kept in mind. First, the petitioner was transporting this cargo as a common carrier by water, not under charter, private carriage or towing arrangement. Second, contrary to what petitioner asserts, this is not a case of the cargo owner's negligence in handling and stowing his cargo. The trial court and appellate court both found that the loading was performed by an independent stevedore. What petitioner is contending for is that a common carrier by water, when performing common carrier service, can relieve itself of its non-delegable duty both at common law and by statute to properly load and stow the vessel by the device of publishing a tariff declaring in effect that stevedores who load the vessel shall become the agents of the shipper and not the carrier; by further providing by tariff that under whatever rate the cargo moves, the carrier shall not be liable for faulty stowage or for faulty loading when not performed by the common carrier, and then in the case where a stevedore, as here, does the loading, issuing a shipper's load and count bill of lading, although the shipper never loaded. Such a devious method of the carrier of avoiding its obligation to stow and load, whether performed by itself or an independent stevedore, the Court of Appeals would not permit, nor have any courts ever permitted this.

The Loading, Stowage and Discharge of Cargo Was the Common-Law Duty of the Water Carrier.

The common law made the public carrier of goods by water absolutely responsible for their safe arrival unless loss or damage was caused by Act of God or of the public enemy or by the inherent vice of the goods or the fault of the shipper—**and** (even where the loss was caused by one of these) the carrier was not negligent or otherwise

at fault. **Gilmore & Black, The Law of Admiralty**, p. 119. The duty imposed by the common law upon water carriers was to transport goods from wharf to wharf, the carrier being required to receive the goods at shipside, load and stow same, and to deliver the goods upon a fit and customary wharf. **Gilmore & Black, The Law of Admiralty**, p. 13; **Isthmian Steamship Co. v. California Spray-Chemical Corp.**, 299 F. 2d 486, 488-489 (9 Cir., 1961). Even petitioner's tariff in question provided by Sec. 1: "The carrier shall be liable as at common law for any loss of or damage to the shipment herein described, except as herein provided" (S. R. 10).

The Harter Act Imposes a Non-Delegable Duty Upon Common Carriers by Water to Properly Load, Stow, Care for and Deliver Cargo.

In the year 1893, carriers by water, having gone to extremes in using exculpatory clauses in bills of lading, the Harter Act (27 Stat. 445, 46 U. S. C. A. 190-196) was enacted. It was designed to afford to cargo interests some protection and at the same time to encourage shipping by allowing liability to be avoided under certain circumstances (See **Gilmore & Black, The Law of Admiralty**, pp. 119-124), but not as to loading and stowing. The Harter Act imposes a non-delegable duty upon the common carrier by water to properly load and stow the cargo.

Section 2 of the Harter Act (46 U. S. C. A. 191), provides that it shall not be lawful to "insert in any bills of lading or any such shipping documents any covenant or agreement **whereby the obligations of the owner or owners of said vessel . . . to carefully handle and stow her cargo** and to care for and properly deliver same, **shall in any wise be lessened, weakened, or avoided.**" (Emphasis ours.) This section clearly recognizes the obligation which the common law casts upon the common carrier by water to

properly load and stow the cargo and prohibits any contract whereby this duty is attempted to be lessened, weakened or was avoided.

This Court has repeatedly held that the meaning of the Harter Act in this respect is perfectly clear and lucid, and that its purpose is to prevent a common carrier by water from avoiding its duty to properly load, stow, care for and deliver cargo. **The Delaware,** 161 U. S. 459, 470-474, 16 Sup. Ct. 516, 40 L. Ed. 771; **Calderon v. Atlas Steamship Co.,** 170 U. S. 272, 277-282, 18 S. Ct. 588, 42 L. Ed. 1033; **Knott v. Botany Worsted Mills,** 179 U. S. 69, 21 S. Ct. 30, 45 L. Ed. 90; **The Germanic,** 196 U. S. 589, 25 S. Ct. 317, 49 L. Ed. 610; **Schnell v. The Vallescura,** 293 U. S. 296, 305-306, 55 S. Ct. 194, 79 L. Ed. 373.

Section 1 of the Harter Act (46 U. S. C. A. 190), declares it unlawful to insert in bills of lading or shipping documents any clause, covenant or agreement relieving the carrier "for loss or damage arising from negligence, fault or failure in proper loading, stowage, custody, care, or proper delivery of any and all lawful merchandise or property committed to its or their charge" and any such clauses are declared null and void.

Thus, the Harter Act imposes a non-delegable duty upon the common carrier by water to properly load and stow the cargo aboard its vessel. **The Germanic,** 124 Fed. 1, 2 (2 Cir., 1903):

> "It is plain that by virtue of this section a carrier cannot avoid liability for negligence in the loading, stowage, custody, care and delivery of merchandise."

This Second Circuit decision was affirmed by this Court, 196 U. S. 589, 25 S. Ct. 317, 49 L. Ed. 610, and in affirming, Justice Holmes commented at 196 U. S. 597:

"The claimant sets up the (Harter) Act and relies upon it. Under the cases, it must take the burdens with the benefits, and no discussion of the terms of the bills of lading, if they might lead to a greater limitation of liability, is necessary. **Knott v. Botany Mills**, 179 U. S. 69; **The Kensington**, 183 U. S. 263, 269."

That the Harter Act clearly does not permit the carrier to avoid its non-delegable duty to load and stow is clearly stated in **The Willdomino**, 300 Fed. 5, 9-10 (3 Cir., 1924), aff'd **S. S. Willdomino v. Citro Chem. Co.**, 272 U. S. 718:

"To meet the ever increasing attempts further to limit the liability of the vessel and her owners by inserting in bills of lading stipulations against losses arising from unseaworthiness, **bad stowage**, negligence, and other causes of liability by which the common-law responsibility of carriers by sea was being frittered away the Harter Act . . . was passed. It was designed to fix the relations between the cargo and the vessel and to prohibit contracts restricting the liability of the vessel in certain particulars. **The Delaware**, 161 U. S. 459, 16 Sup. Ct. 516, 40 L. Ed. 771. By the first section of that act contractual clauses whereby the carrier 'shall be relieved from liability for loss or damage arising from negligence, fault, or **failure in proper loading, stowage**, custody, care, or proper delivery' of any of the cargo are made null and void, while the last clause of the second section makes unlawful any agreement 'whereby the obligations of the master, officers, agents, or servants to carefully handle and stow her cargo and to care for and properly deliver same, shall in any wise be lessened, weakened, or avoided.' These two sections, in their general purport, so far as respects the care and

delivery of the cargo, are not essentially different. **Calderon v. Atlas Steamship Co.**, 170 U. S. 272, 277, 18 Sup. Ct. 588, 42 L. Ed. 1033." (Emphasis ours.)

What the Harter Act prohibits the carrier to do is exactly what petitioner has attempted to do: namely, avoidance of liability for improper stowage of cargo aboard its vessel by inserting in the tariff the exculpatory language in question [Sections 10 (a) and 11 (e) of its tariff at S. R. 13-15] and by placing the same wording in its bill of lading. By the terms thereof, petitioner disclaims liability for improper loading or stowing under whatever rate it carries a shipper's merchandise. As stated by the Court of Appeals in this case, this exculpatory language "flies in the very teeth of the prohibition of the Harter Act" (289 F. 2d 374, 381; pp. 12a-13a of Petition). Petitioner tries to make the stevedores in Pittsburgh and Owensboro the agents of the shipper, but since it is the non-delegable duty of a ship to load in the case of common carriage, this device is likewise unsuccessful, and the Court of Appeals so held (289 F. 2d 374, 382; p. 15a of Petition).

The Harter Act Applies to Common Carriage on Inland Waterways by Means of Towboats and Barges.

The Harter Act has long been held to apply to common carriage by means of towboats and barges with exactly the same force as it applies to the largest ocean-going ships. **Rooks v. Elliott & Watrous**, 65 F. Supp. 325; **The Bathgate**, 25 F. 2d 103 (3 Cir., 1928), cert. den., 277 U. S. 589; **In re O'Donnell**, 26 F. 2d 334 (2 Cir., 1928). As this Court stated in the leading case of **Sacramento Navigation Co. v. Salz**, 273 U. S. 326, 330, 47 S. Ct. 386, 71 L. Ed. 644 (1927), in referring to the applicability of the Harter Act to merchandise transported in an unmanned barge propelled by a towboat in common carriage:

> "In light of the decisions presently to be noted, the words, 'a vessel transporting merchandise' etc., are entirely appropriate to describe the combination now in question, and we see no reason to think that Congress intended that they should not be so applied."

In fact, under circumstances subsequently held to constitute towage, petitioner has urged the courts to find a towing contract to be affreightment so as to entitle petitioner to the benefits of the Harter Act. **Mississippi Valley Barge Line Co. v. T. L. James & Co.**, 144 F. Supp. 662.

Exculpatory Clauses in Derrogation of the Harter Act Cannot Be Validy Embodied in a Tariff.

Inclusion of petitioner's void exculpatory clauses in its tariff does not make such clauses binding upon the shipper or the courts. As we have shown, the Harter Act imposes upon common carriers by water the non-delegable duty of loading and stowing cargo and declares agreements in avoidance of this duty to be void and illegal. Petitioner nevertheless argues that these exculpatory clauses are contained in its tariff filed with the Interstate Commerce Commission and that, therefore, these void exceptions are valid until action is taken to have the Commission disapprove them. As its sole authority for this rather preposterous argument, petitioner cites **Southwestern Sugar & Molasses Co., Inc. v. River Terminals Corp.**, 360 U. S. 411, 79 S. Ct. 1210, 3 L. Ed. 1334 (1959), which involved towage and not common carriage (as here) and which also shows the invalidity of petitioner's argument. For as Justice Harlan pointed out in that case, the Interstate Commerce Commission is without authority to affect the liability of water carriers engaged in common carriage (Footnote 6 at 360 U. S. 417); and if provisions

in tariffs filed with the Interstate Commerce Commission are in derogation of the Harter Act, they are invalid nevertheless and no recourse need first be had to the Commission before the courts may so hold (Footnote 9 at 360 U. S. 420).

The **Southwestern Sugar** case involves an exculpatory clause in a **towage contract** embodied in a tariff. Before considering its validity, Justice Harlan first pointed out that common carriage was not involved, 360 U. S. 416-417, carefully noting that the Interstate Commerce Commission is without authority to affect the liability of common carriers by water. Footnote 6 at 360 U. S. 417.

The Interstate Commerce Commission acquired authority over water carriers by virtue of Part III of the Interstate Commerce Act, 49 U. S. C. A. 901 et seq. However, Section 920 (d) explicitly provides:

> "(d) Nothing in this chapter shall be construed to affect any law of navigation, the admiralty jurisdiction of the court of the United States, **liabilities of vessels and their owners for loss or damage,** or laws respecting seamen, **or any other maritime law, regulation or custom not in conflict with the provisions of this chapter.**" (Emphasis ours.)

Therefore, Justice Harlan made it quite clear at 360 U. S. 417-418 that while the Interstate Commerce Commission could affect the liability of a regulated **tower** involved in **Southwestern Sugar,** the Commission was specifically deprived of authority by Congress to affect the liability **of a common carrier by water**—the capacity in which petitioner was acting in this instance. In fact, footnote 5 of the Court's opinion at 360 U. S. 416-417 demonstrates that provisions specifically declared illegal by Congress, even if contained in a carrier's duly filed tariff, are nonetheless void:

"5 Compare **Boston & Maine R. Co. v. Piper**, 246 U. S. 439, 445, where this Court held a limitation of liability clause void although filed as part of a tariff with the I. C. C. by a rail carrier, saying that: 'While this provision was in the bill of lading, the form of which was filed with the Railroad Company's tariffs with the Interstate Commerce Commission, it gains nothing from that fact. The legal conditions and limitations in the carrier's bill of lading duly filed with the Commission are binding until changed by that body (citation) . . . but not so of conditions and limitations which are, as in this one, illegal, and consequently void.' The decisive difference between **Piper** and this case is that there the exculpatory clause was specifically declared illegal by the Interstate Commerce Act itself. See 49 U. S. C., § 20 (11)."

Apparently anticipating that water carriers might attempt to use the **Southwestern Sugar** opinion as a basis for tariff exemptions relieving them from statutory obligations when acting as common carriers by water, Justice Harlan carefully qualified the Court's opinion (360 U. S. 419-420):

"If the peculiar hazards involved in towing a barge supplied by the shipper are great, and the methods of guarding against those hazards uncertain, it may be that in an area where Congress has not expressly or by fair implication declared for a particular result, the federal courts should creatively exercise their responsibility for the development of the law maritime to fashion a particularized rule to deal with particularized circumstances.[9]

[9] "**Congress has in some instances declared by statute** the circumstances under which carriers may contract for release from or limitation of liability, or **rules governing the liability** or exemption from lia-

bility **of carriers irrespective of contract.** See 46 U. S. C. 181-196, 1300-1315 (water carriers) * * * **Where such statutes apply of course no agreement in derogation of them, even if embodied in a tariff, is valid.** See, e. g., **Adams Express Co. v. Croninger,** 226 U. S. 491; **Boston & Maine R. Co. v. Piper,** supra." (Emphasis ours.)

Petitioner's argument that the tremendous growth of transportation of merchandise in common carriage by barges on the Mississippi River makes it impossible for the common carrier to supervise the stowage of cargo is an argument that might appropriately be presented to a congressional committee considering an amendment to the Harter Act but not to the courts. The Harter Act has long been held to apply to common carriage by means of towboats and barges; and no common carrier on our inland waterways—least of all, the petitioner in this case—has ever suggested that the Harter Act is not applicable to such common carriage. Nor is there even a single case to be found where a common carrier by means of towboats and barges or otherwise ever successfully contended that its obligation to properly load and stow could be shifted to the shipper. No such case is cited by petitioner. Instead, petitioner goes completely outside the record on pages 8-9 of its petition to present its version of modern inland waterways water carriage and to argue that today's water carrier should not be charged with the duty of properly loading and stowing cargo. However, petitioner omitted mentioning that most river transportation involves mere towage (which is not subject to the Harter Act) rather than common carriage, as pointed out by Justice Frankfurter in footnote 14 of his dissenting opinion in **Bisso v. Inland Waterways Corp.,** 349 U. S. 85, 117-118. The fact that petitioner owns no loading facilities at Pittsburgh or various other places does not affect this

case. What water carrier, whether by barge, steamboat or ocean-going vessel owns loading terminals at all ports of call? The facts that loading is done by stevedores today and that, directly or indirectly, the shipper pays the cost of stevedoring have never been held to relieve the common carrier by water from its obligations under the Harter Act to properly load and stow cargo aboard its vessel. Moreover, it is the common carrier, not the far-distant shipper, who is in a position to exercise control over the stevedore and to insist upon proper stowage. This was petitioner's duty under the Harter Act and it has properly been held liable for its failure. **Schnell v. The Vallescura**, 293 U. S. 296, 305-306. To paraphrase Justice Holmes in **The Germanic**, 196 U. S. 589, 598, petitioner finds itself in the position of the little boy who wishes to have his cake and also eat it; petitioner wishes to act as a common carrier by water, charging common carriage rates, and also to limit its liability to that of a mere tower. If petitioner desired to avoid the obligations of a common carrier subject to the Harter Act, petitioner should have chartered its barge to respondents and charged only towage rates, as was done in the **Southwestern Sugar & Molasses** case, supra.

The argument is advanced at p. 12 of the Petition that this shipment moved under the higher "A" rate; that thereunder the carrier, by the terms of its bill of lading, assumed obligations beyond its legal duty under the third section of the Harter Act, 46 U. S. C. A., § 192; and that consequently, it is argued, petitioner could avoid its obligation to load and stow under the first and second sections of the Harter Act, 46 U. S. C. A., §§ 190-191. This argument has no validity. In the first place, the Harter Act does not grant the common carrier the option of declining its benefits and avoiding its burdens. In the second place, whether a shipment moves under the higher

"A" rate under Section 10 of petitioner's tariff (S. R. 13-14), or under the lower "B" rate under Section 11 (S. R. 14) where all Harter Act benefits are accepted by petitioner, petitioner's tariff and bill of lading attempt to relieve it from its common carrier's obligation to load and stow under all rates. The third section of the Harter Act, 46 U. S. C. A., § 192, sets forth the risks to which the carrier **may** limit its liability, but not as to what it **must** limit them. Therefore, if in consideration of a higher rate the common carrier wishes to forego certain of its statutory exemption, there is nothing to prevent it from so doing. But when it comes to loading and stowing, the first and second sections of the Harter Act, 46 U. S. C. A., §§ 190-191, are not enabling, but **mandatory**. These sections specifically prohibit the insertion of the clauses as they appear in petitioner's tariff and bill of lading which relieve it from its duty either by itself or through the use of stevedores to properly load and stow.

The very evil which the Harter Act sought to remedy was the water carrier's shifting of liability for damage caused by improper loading and stowage upon the shipper. **The Delaware**, 161 U. S. 459, 471-474. If this liability could be shifted by the device of filing an exculpatory tariff or by issuing a shipper's load and count bill of lading, there would be a plethora of decisions so holding. Petitioner cannot cite even one. Moreover, if petitioner could thus avoid its liability, a shipper would have to sue stevedores in as many different jurisdictions as there were loadings, trying to establish which stevedores were responsible for the damage. And if petitioner could thus avoid its liability for improper loading and stowage, so could not only all common carriers on all our rivers, but also common carriers on all inland waters, including the Great Lakes, and all ocean carriers transporting property between ports of the United States, for

the Harter Act, by its very terms, treats uniformly all common carriage by water between ports of the United States.

The Federal Bill of Lading Act Does Not Authorize Common Carriers by Water to Foist the Duty of Proper Stowage Upon Shippers.

Petitioner argues (p. 11 of its Petition) that the obligation of safe stowage may be shifted by a water carrier to the shipper by means of a "shipper's load and count" bill of lading pursuant to 49 U. S. C. A., 101. Petitioner complains that the Court of Appeals summarily rejected its unique argument because such avoidance of the obligation of safe stowage "flies in the very teeth of the provisions of the Harter Act."

As pointed out above, the Harter Act imposes a non-delegable duty upon the common carrier by water to properly load, stow, care for and deliver cargo.* Petitioner's argument that the Federal Bill of Lading Act, enacted in 1916, "legislatively qualifies" the Harter Act so as to permit a water carrier to shift the obligation of safe stowage to the shipper would probably shock the many courts that have upheld the Harter Act since 1916 and, indeed, must come as a surprise to this Court which in 1939 declared:

> "Here the stipulation was for exemption from liability for a particular kind of injury—decay. But the decay of a perishable cargo is not a cause; it is an effect. It may be the result of a number of causes,

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* In addition to the decisions of this Court heretofore cited, see also *The Fernchiff*, 22 F. Supp. 728 (D. Ct. Ind., 1938); *Bethel v. Melon & Kittenhouse Co.*, 131 Fed. 129 (D. Ct. Pa., 1904); *Mackey v. United States*, 83 F. Supp. 14 (D. Ct. N. Y., 1948); *Norpac Trading Corporation v. The Mathilda Thorden*, 173 F. Supp. 23 (D. Ct. Pa., 1959).

for some of which, such as the inherent defects of the cargo, or, under the contract, sea peril making it impossible to ventilate properly, the carrier is not liable. For others, such as negligent stowage, or failure to care for the cargo properly during the voyage, he is liable. The stipulation thus did not add to the causes of injury from which the carrier could claim immunity. It could not relieve him from liability for want of diligence in the stowage or care of the cargo." 293 U. S. 305-306.

The foregoing statement was by Justice Stone in the case of **Schnell v. The Vallescura,** 293 U. S. 296, 305-306, 55 S. Ct. 194, 79 L. Ed. 373 (1939). There is certainly nothing in the legislative history of the Federal Bill of Lading Act which even remotely suggests that Congress thereby intended to repeal the Harter Act requirement that common carriers by water are responsible for proper stowage. The purpose of the Federal Bill of Lading Act was to promote the negotiability of bills of lading by protecting holders in good faith. See Annotations to 49 U. S. C. A., § 81. It is stated at 53 Congressional Record 3934 that the purpose of Sections 20 and 21 of the Federal Bill of Lading Act was to **reduce**—not to enlarge—the carriers' right to mark bills of lading "Shipper's Load and Count" because of the abuses that had arisen.

The Federal Bill of Lading Act does not even suggest that a common carrier by water can avoid its duty to properly load and stow. Sections 20 and 21 of this Act (49 U. S. C. A., Sections 100-101) do not even imply that "Shipper's weight, load and count" should apply when the carrier is required by law to load and stow.

The Federal Bill of Lading Act and the Harter Act are entirely compatible until petitioner attempts to read into the Federal Bill of Lading Act permission to avoid its

non-delegable duty to properly load and stow by delegation to the shipper. **Gardner v. The Danzler**, 281 F. 2d 719 (4 Cir., 1960):

> "It is a cardinal principle of construction that repeals by implication are not favored. When there are two acts upon the same subject, the rule is to give effect to both if possible. . . . The intention of the legislature to repeal 'must be clear and manifest'. . . . It is not sufficient, as was said by Mr. Justice Story in Wood v. United States . . . 'to establish that subsequent laws cover some or even all of the cases provided for by (the prior act); for they may be merely affirmative, or cumulative, or auxiliary.' There must be 'a positive repugnancy between the provisions of the new law, and those of the old; and even then the old law is repealed by implication only *pro tanto* to the extent of the repugnancy' . . ." (Citations omitted. l. c. 724.)

There is no such repugnancy here, because the Federal Bill of Lading Act does not even purport to relieve the common carrier by water from the duties imposed by the Harter Act. As a matter of fact, the Harter Act contains its own provision as to bill of lading provisions concerning weight and apparent good order, 46 U. S. C. A., § 193, which provides:

> "§ 193. Bills of lading to be issued; contents.
>
> It shall be the duty of the owner or owners, masters, or agent of any vessel transporting merchandise or property from or between ports of the United States and foreign ports to issue to shippers of any lawful merchandise a bill of lading, or shipping document, stating, among other things, the marks necessary for identification, number of packages, or quantity, stating whether it be carrier's or shipper's weight, and

apparent order or condition of such merchandise or property delivered to and received by the owner, master, or agent of the vessel for transportation, and such document shall be prima facie evidence of the receipt of the merchandise therein described. Feb. 13, 1893, c. 105, § 4, 27 Stat. 445."

CONCLUSION.

When acting as a common carrier by water and performing public carriage of merchandise (rather than mere towage), petitioner is subject to all of the laws applicable to common carriage by water, including the Harter Act. It is well-settled law that the Harter Act applies to common carriers by water using barges and towboats to transport cargo. Under the Harter Act, it is clear that the stevedores are the agents of the carrier or vessel in performing loading and stowage; this non-delegable duty cannot be circumvented by "agreement" that the stevedores shall be the agents of the shipper. While petitioner is entitled to require the shipper to pay the stevedores, the Harter Act prohibits petitioner from exculpating itself of liability for proper loading and stowage of its vessel. Clauses in petitioner's bill of lading exculpating petitioner from liability for improper stowage are void under the Harter Act. The Interstate Commerce Commission is clearly without authority to modify the liabilities of common carriers by water for cargo damage, and this Commission cannot repeal the Harter Act. It is equally well settled that tariff provisions in derogation of express Congressional legislation are invalid; therefore, petitioner's exculpatory provisions in derogation of the Harter Act, even though embodied in a tariff filed with the Interstate Commerce Commission, are illegal and void.

It is therefore respectfully submitted that the decision of the Court of Appeals for the Eighth Circuit is correct.